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No. 90-5319

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PAUL MCNEIL,
Petitioner,

v.

WISCONSIN,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Was the petitioner Paul McNeil's acceptance of assistance of counsel and appearance with counsel at an initial appearance on a charged offense of armed and masked robbery an invocation of McNeil's Fifth Amendment right to counsel that precluded police initiated interrogation on an unrelated, uncharged homicide while the accused was in continuous custody?

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BRIEF FOR PETITIONER

This Brief is respectfully submitted by the petitioner, Paul McNeil, who was convicted of second degree murder, armed burglary, and attempted first degree murder, all as party to a crime, in Racine, Wisconsin on March 19, 1988. McNeil seeks reversal of the judgment of the Wisconsin Supreme Court which affirmed these convictions.

OPINIONS BELOW

The Wisconsin Supreme Court on direct appeal affirmed the convictions of McNeil. *State of Wisconsin v. McNeil*, 155 Wis.2d 24 (1990); reprinted at J.A. 23.[1]

JURISDICTION

The judgment of the Wisconsin Supreme Court affirming the trial court conviction of McNeil was entered on May 2, 1990. Rehearing was not sought. Jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 1257 (a).

[1] "J.A. ——" references are to pages in Joint Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States. These provisions are set forth in the Statutory Appendix to this Brief.

STATEMENT OF THE CASE

McNeil was convicted of second degree murder, attempted first degree murder, and armed burglary, all as party to a crime, on March 19, 1988. His conviction and sentence of 60 years was affirmed on May 2, 1990, by the Wisconsin Supreme Court (J.A. 41). A petition for certiorari was filed on July 30, 1990, and granted October 29, 1990.

STATEMENT OF FACTS

On May 18, 1987, Sergeant Robert Stauss of the Caledonia Police Department had in his own estimate sufficient information garnered from his own investigation and that of Detective Joseph Butts of the Milwaukee County Sheriff's Department implicating McNeil as a participant in a Town of Caledonia, County of Racine, Wisconsin homicide and requested a homicide complaint and warrant for McNeil's arrest (R 47-5, 7, 8).[2] Stauss had been informed on May 13, 1988, by the Milwaukee Police Department that McNeil was in custody in Omaha (R 47-12). The Omaha authorities knew that Stauss wanted to talk to McNeil and Lloyd Crowley (McNeil's eventual co-defendant in the homicide charge) (R 47-11).

Subsequently, Milwaukee County Deputy Sheriffs obtained custody of McNeil on May 20, 1987, in Omaha, Nebraska, where he was being held pursuant to a State of Wisconsin, County of Milwaukee arrest warrant for armed and masked robberies. On May 20, 1987, the deputies travelled to Omaha to escort McNeil back to Milwaukee after extradition proceedings had taken place in Omaha concerning the robberies. McNeil was to be transported back to Milwaukee County for an Initial Appearance on the robbery charges.

[2] "R——" references are to the Record as filed with the Wisconsin Supreme Court.

The Milwaukee County detectives, more particularly Detective David Smukowski, first contacted McNeil on May 20, 1987 (R 44-3, 4). At the time that Smukowski went to Omaha, he was aware that McNeil was possibly involved in a murder in Caledonia (R 44-5). Smukowski and his partner gave McNeil his Miranda warnings read from a standard County of Milwaukee Statement of Rights document (J.A. 5) (R 44-6, 9, 10). McNeil was asked if he wanted to talk to the deputies. McNeil said no and the deputy stopped the conversation. McNeil said nothing more than no (R 44-6).

The following day, May 21, 1987, Detective Smukowski again spoke to McNeil. Smukowski was aware that everyone in the Milwaukee County Division to which he was assigned knew that McNeil was a suspect in a homicide and armed robbery and was being brought back from Omaha (R 44-8). Stauss testified that "Milwaukee was well aware of what I was investigating." (R 47-12). Smukowski, while transporting McNeil to the airport, engaged him in conversation. He told McNeil that it would be to his advantage if he told about his involvement and the extent of his involvement in both the homicide case and the armed robbery cases. Smukowski indicated to McNeil that if he cooperated it might result in some consideration for McNeil in the future (R 44-6, 7, 8, 9). McNeil was taken out of the Omaha jail for 2-3 hours, accompanied by the deputies and Omaha detectives, and unsuccessfully sought the location of Crowley, who was the other suspect in the Caledonia homicide (R 44-13).

On May 21, 1987, McNeil was returned to Milwaukee. He was brought before a Judicial Court Commissioner on

May 22, 1987, in the morning hours, for an initial appearance on the robberies (R 53-16). When McNeil appeared before the Commissioner, he appeared with a public defender. Bail was set on the robberies and a preliminary examination was scheduled (R 31-1 thru 6) (J.A. 8-11).

At approximately 7:55 p.m. on May 22, 1987, Detective Butts of the Milwaukee County Sheriffs Department initiated a visit to McNeil's jail cell to interrogate him (R 40-10,12). Detective Butts was aware of the homicide in Caledonia from information received from Sergeant Stauss (R 40-29). Butts had been assisting the Caledonia Police in their investigation of the Caledonia homicide since late April, 1990 (R 40-29). Butts went to see McNeil in McNeil's cell for the purpose of talking to him about the armed robbery in Milwaukee and possibly the Caledonia homicide (R 40-12, 14, 29).

When Butts spoke with McNeil on May 22, 1987, he had knowledge that McNeil had not made statements to the Sheriffs returning McNeil from Omaha (R 40-49). Butts was not aware that earlier on May 22, 1987, McNeil had an attorney appointed to represent him on the armed robberies and had appeared with that attorney at an initial appearance (R 40-50).

Detective Butts advised McNeil of his Miranda Rights using the same type of form that Detective Smukowski had used in Omaha (J.A. 12) (R 40-11, 73). Butts questioned McNeil almost exclusively about the Caledonia homicide (R 40-14). McNeil gave an exculpatory statement (R 40-34). Butts did not believe McNeil's statement and told him that he would return to talk to him further (R 40-34). Butts returned with five other detectives and officers to interrogate McNeil on May 24, 1987 (R 40-37, 38, 39, 40). During the course of this interrogation, McNeil gave a statement which was partly exculpatory and partly inculpatory (R 40-37, 38). Still not

satisfied with McNeil's statement, Butts initiated a third interrogation of McNeil on May 26, 1987 (R 40-41) during which McNeil gave an inculpatory statement concerning the Caledonia homicide (R 40-42).

The interrogation of McNeil on May 24, 1987, lasted approximately five hours and took place in the presence of five to six detectives (R 40-38, 39, 40). The May 26, 1987, interrogation lasted approximately one and a half hours and was in the presence of at least five detectives (R 40-42).

The felony warrant request of Sergeant Stauss which was dated May 18, 1987, was date stamped received by the Racine District Attorney's Office on May 27, 1987 (R 47-17) (J.A. 4). On May 27, 1987, a complaint and warrant were issued for McNeil charging him with the Caledonia homicide (R 40-69) (J.A. 4).

McNeil was brought before a Racine County Magistrate on June 4, 1987, on charges which involved the Caledonia homicide (R 40-69). Various motions and hearings were held including motions to suppress the statements which had been made by McNeil in the Milwaukee County Jail and Milwaukee Sheriff's Detective Bureau. None of these motions involved the issue which is presently before this Court. After hearings and various negotiations, McNeil entered no contest pleas to amended charges of second degree murder, attempted first degree murder, and armed burglary all as party to a crime (R 51-20). At the plea hearing, McNeil was advised by the court that his confession was admissable and based on that ruling McNeil felt it was in his best interest to enter into the plea negotiation (R 51-24) (R 53-4, 14) (R 30-3). Subsequently motions were filed with the trial court including ineffective assistance of counsel for failure to raise the issue which is presently before this Court.

A hearing was held before the trial court involving the issue presently before this Court. After hearing argu-

ment and reading briefs, the trial court ruled against McNeil. The trial judge decided that even if he had been aware of the case law which had been raised at the post-conviction motions, *United States ex rel Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987), *cert. denied*, 43 U.S. 1030 (1987), his decision would have been the same (J.A. 14, 15).

On direct appeal to the Wisconsin Supreme Court, McNeil argued that his statements while in custody in Milwaukee County were improperly received in evidence and that the conviction based on those statements should have been set aside. McNeil argued that when he appeared with counsel before the Judicial Court Commissioner on May 22, 1987, he had invoked his Fifth Amendment right to counsel that precluded police initiated interrogation on an unrelated, uncharged homicide while he remained in continuous custody. In rejecting McNeil's Fifth Amendment claim, the Wisconsin Supreme Court held:

> "Since there is no Sixth Amendment right to counsel on uncharged offenses, an invocation of that right at an initial appearance or arraignment on a charged offense does not bring the expanded scope of the Fifth Amendment *Edwards* rule into play with respect to interrogation on uncharged offenses." See *Moran v. Burbine*, 475 U.S. 412, 431 (1986); *Maine v. Moulton*, 474 U.S. 159, 180 n. 16 (1985); *McNeil, supra*, at 34 (J.A. 28).
>
> "We do not read *Butler* [110 S.Ct. 1212 (1990)] and *Roberson* as affecting a transmutation of the Sixth Amendment right to counsel into a Fifth Amendment right to counsel. We hold that a defendant does not invoke his or her Fifth Amendment right to council by invoking the Sixth Amendment right to counsel at an initial appearance." *McNeil, supra*, 36 (J.A. 30).

The Wisconsin Supreme Court did not consider the initial appearance to be a venue where McNeil was subject to custodial interrogation and therefore his Fifth Amendment rights were not appropriately invoked.

> "The Fifth Amendment right to counsel recognized in *Miranda* is not one that attends a criminal suspect under all circumstances and in every situation. Rather, it attaches only when an accused is in custody, *United States v. Henry*, 447 U.S. 264, 273 n.11 (1980), and subject to custodial interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 198 (1980). An accused may well be in custody at an initial appearance but he is not being subjected to interrogation. Thus, there is no Fifth Amendment right to counsel at an initial appearance. When an accused invokes his Sixth Amendment right to counsel at that appearance, there is no basis for concluding that he is invoking his Fifth Amendment right to counsel." *McNeil, supra*, at 36 (J.A. 30).

The court rejected McNeil's reliance on language in *Michigan v. Jackson*, 475 U.S. 625 (1986) at 633-634 n.7 that a request for counsel at an initial appearance invokes the Fifth Amendment right to counsel. In rejecting McNeil's analysis, the Wisconsin Court found that:

> "The 'ordinary meaning' of a defendant's request for counsel at an initial appearance is only that he is invoking his Sixth Amendment right to counsel in the pending prosecution. When a defendant invokes his Sixth Amendment right to counsel on a pending prosecution by requesting or accepting counsel at the initial appearance, it need not be viewed as an invocation of the Fifth Amendment right precluding interrogation on unrelated crimes any more than a limited invocation of the Fifth Amendment right to counsel in *Barrett* needed to be viewed as an invocation of the full Fifth Amendment right." *McNeil, supra*, at 39 (J.A. 33).

In dissent, Chief Justice Nathan Heffernan found that the majority had misstated the issue. Rather than a

transmutation of a Sixth Amendment right to a Fifth Amendment right, the issue was whether McNeil had:

> "invoked his Fifth Amendment right to counsel when he requested assistance of counsel at an initial appearance instead of while being interrogated afterwards." *McNeil, supra,* at 48 (J.A. 41).

Concerned that the majority was misreading *Miranda,* Heffernan wrote:

> "Because the defendant is not being interrogated when he makes his request for an attorney, the majority leaps to the conclusion that there is no danger of compelled testimony, and, therefore, the Fifth Amendment right to counsel which arises from the protection against self-incrimination does not implicate it. The majority misreads the holdings of *Miranda v. Arizona, supra,* and *Edwards v. Arizona, supra.*" *McNeil, supra,* at 49 (J.A. 42).

The dissent rejected the majority view that the invocation of counsel must take place while a defendant is being interrogated.

> "It is apparent that there is danger of 'subtle compulsion' when a defendant requests the assistance of an attorney at an initial appearance and is nevertheless subjected to further interrogation while custody continues. Whether a request for an attorney is made to a police officer or to a judge, whether in the jail or during an initial appearance, the dangers of the inherent pressure of custodial interrogation when not having an attorney present are the same. Just as the *Edwards* protection is not dependent upon the subject matter of the interrogation, neither is this protection dependent upon whether the request for assistance of counsel is made to a police officer while in custody or to a magistrate at an initial appearance before the defendant is interrogated." *McNeil, supra,* at 50 (J.A. 43).

SUMMARY OF ARGUMENT

The Wisconsin Supreme Court has misapplied numerous decisions of this Court construing the Fifth and Sixth Amendments which require reversal of McNeil's conviction. The Wisconsin majority held that McNeil who appeared with counsel at an initial appearance for armed and masked robberies had only invoked his Sixth Amendment right to counsel and had not invoked his Fifth Amendment right to counsel. Therefore any statement involving unrelated crimes obtained from McNeil during police initiated interrogation while he was in continuous custody was admissable. The Wisconsin ruling is contrary to the intent of Miranda and its progeny and disregards this Court's implied findings in previous cases that an accused who appears at arraignment or similar hearing with counsel has invoked his right to counsel pursuant to the Fifth Amendment.

The intent of *Miranda v. Arizona,* 384 U.S. 438 (1966), was to protect an accused from making self-incriminating statements unless the accused did so after waiving certain rights including the right to counsel. The waiver of an accused has to be made "voluntarily, knowingly and intelligently." *Miranda, supra,* at 444. Once in custody, the accused may invoke his right to counsel at "any stage of the process." *Miranda, supra,* at 444. Once the accused has invoked his right to counsel, all interrogation must cease until an attorney is present. *Miranda, supra,* at 474.

The accused can retain counsel or have counsel appointed. An accused can request counsel from a police officer, magistrate or judge. *Michigan v. Jackson,* 475 U.S. 625 (1986). When an accused makes a request, he does not know whether he is making a request pursuant to the Fifth Amendment or Sixth Amendment. *Jackson, supra,* at 633-634 n.7. "The settled approach to questions of waiver is to give a broad, rather than a narrow interpretation to a defendant's request for counsel." *Jack-*

son, supra, at 633; *Connecticut v. Barrett*, 479 U.S. 523, 529.

When McNeil was arrested by Milwaukee authorities in Nebraska for armed and masked robbery, he was given Miranda warnings and declined to make a statement. When asked the next day by the Milwaukee Sheriffs to cooperate and make a statement, understood by Detective Smukowski to concern either the armed robberies or homicide, McNeil declined. (R 44-7) Subsequently when McNeil accepted appointed counsel at an initial appearance, he spoke no words that he was invoking counsel only for Sixth Amendment purposes. Ignoring this sequence of events, the Wisconsin majority read the reasoning of *Jackson* and *Barrett* narrowly and incorrectly held that McNeil had not invoked his Fifth Amendment right to counsel.

Once an accused has invoked his right to counsel, police may not initiate interrogation. *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981). The accused may waive his previously invoked right to counsel by initiating interrogation with police and then voluntarily, knowingly, and intelligently waiving his Miranda rights. *Edwards, Id.* Unless the accused initiates such an interrogation, the police may not question him even on unrelated crimes. *Arizona v. Roberson*, 486 U.S. 675 (1987).

This Court has implied that when an accused retains counsel after a bond hearing that the accused has invoked his Fifth Amendment right to counsel thereby triggering the *Edwards* rule. *Wyrick v. Fields*, 459 U.S. 42 (1982). This Court has also implied that the request for appointed counsel at an arraignment triggers the *Roberson* rule. *Wolff v. United States, cert. granted*, 488 U.S. 807 (1988). The Court has implied that appearance with counsel at a bond hearing triggers the *Roberson* rule. *Butler v. McKellar*, 110 S. Ct. 1212 (1990).

The Wisconsin Supreme Court misapplied the broad interpretation required when a defendant requests counsel. *Jackson, supra,* at 633. Without citing authority,

the Wisconsin majority said the invocation of the Fifth Amendment right to counsel can only occur during interrogation. This rule is contrary to the intent and spirit of Miranda which requires an environment free from government "compulsion, subtle or otherwise." *Barrett, supra,* at 528. When an accused such as McNeil appears in court with counsel after being previously advised of his right to appointed counsel by police officers and is subsequently interrogated by police, the danger of subtle compulsion is present. *Barrett, supra,* at 528.

The rule proposed by McNeil is simple and concise. If an accused appears at an arraignment or similar hearing with counsel, absent a specific limitation by the accused, the invocation of counsel includes the Fifth Amendment right to counsel thereby triggering the rules of *Edwards, Jackson, Roberson.* The purpose of the bright line rules underlying these cases serves as an appropriate basis for a bright line rule being applied to McNeil.

ARGUMENT

I. THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE McNEIL'S CONVICTION WAS OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT

Miranda and its progeny, imposed "prophylactic standards . . . to safeguard the Fifth Amendment privilege against self-incrimination." *Michigan v. Harvey*, 110 S. Ct. 1176 (1990). The Court in Miranda: ". . . concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Miranda, supra,* at 467. One of

the rights mandated by Miranda was the "right to the presence of an attorney, either retained or appointed." *Miranda, supra,* at 444. "If, however, he [defendant] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda, supra,* at 445.

The series of incriminating statements obtained from McNeil by Detective Butts and his associates were contrary to the mandates of Miranda and its progeny. Within hours after McNeil invoked his right to counsel and appeared with counsel at an initial appearance on May 22, 1987, Detective Butts initiated an interrogation of McNeil in his cell at the Milwaukee County Jail. Not satisfied with the statement he received on May 22, 1987, Butts initiated further reinterrogations of McNeil in police dominated atmospheres which resulted in self-incriminating statements. All of these interrogations took place in atmospheres which generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda, supra,* at 467; *Illinois v. Perkins,* 110 S. Ct. 2394, 2397 (1990). The Wisconsin Supreme Court's decision allowing police initiated interrogation of McNeil while he was in continuous custody, after McNeil's invocation of his right to counsel and his appearance with counsel at an initial appearance is in conflict with applicable decisions of this Court.

A. The Wisconsin Supreme Court's Ruling Rests on an Erroneous Reading of *Michigan v. Jackson*

The Wisconsin Supreme Court held that a defendant "does not invoke his or her Fifth Amendment right to counsel by invoking the Sixth Amendment right to counsel at an initial appearance." *McNeil, supra,* at 36 (J.A. 30). The court based this finding on its understanding that if an accused is not being subjected to interrogation then the accused cannot invoke his or her Fifth Amendment right to counsel. *McNeil, supra,* at 36 (J.A. 30).[3] In reaching its conclusion, the Wisconsin Supreme Court distorted the plain meaning of language in *Jackson* ("doubts must be resolved in favor of protecting the constitutional claim . . ." *Jackson, supra,* at 632), and misread the rule of *Connecticut v. Barrett,* 479 U.S. 523, 528 (1987), which reaffirmed the *Jackson* language on invocation of counsel.

The Wisconsin Court accepted the language in *Jackson* that analyzed two sources for the right of counsel at post arraignment, custodial interrogations. *McNeil, supra,* at 32, 33 (J.A. 23, 28). The Wisconsin Court concluded that the "ordinary meaning", (*Barrett, supra,* at 529-530), of a defendant's request for counsel at an initial appearance is that he is only invoking his Sixth Amendment right to counsel in the pending prosecution. *McNeil, supra,* at 39-40 (J.A. 33).[4] The Wisconsin Court was certain that a defendant who had appeared with counsel at an initial appearance would not suffer from "subtle compulsion" if later he were to be interrogated by police while in custody after being provided with Miranda warnings, including the right to counsel. *McNeil, supra,* at 37 (J.A. 31). This analysis is contrary to the reasoning and language in both *Jackson* and *Barrett.*

The record of McNeil's appearance at his initial appearance is devoid of any speech on McNeil's part other

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[3] It can be presumed that if the Wisconsin Court ruled that McNeil had invoked his Fifth Amendment right to counsel by appearing with counsel at his initial appearance that the Wisconsin Court would have felt compelled by *Arizona v. Roberson, supra,* at 675, 685 (1988) to reverse the trial court's ruling. *McNeil, supra,* at 34, 35, 36 (J.A. 29, 30).

[4] The Wisconsin Court's concept of the "ordinary meaning" of a defendants invocation of counsel at an arraignment or initial appearance is not so obvious. State and Federal Courts have adopted divergent rules on this very issue and serve as one of the basis of McNeil's Petition for Writ of Certiorari which was granted in this case on July 30, 1990.

than McNeil's acknowledgment of penalties for armed and masked robbery (R 31-6) (J.A. 8-11). The Wisconsin Supreme Court's only reference to the initial appearance record were that bail was set, a preliminary examination was scheduled, and the court made the further observation that McNeil "had an attorney with him" at the initial appearance. *McNeil*, *supra*, at page 31 (J.A. 26). The Wisconsin Supreme Court found nevertheless that: (1) McNeil did not want his counsel to assist him with custodial interrogations as opposed to adversary proceedings, and, (2) that McNeil was not concerned with having assistance of counsel for interrogations dealing with charges other than the armed and masked robberies. *McNeil*, *supra*, at 36, 37, 39, 40 (J.A. 30-34). These findings of the Wisconsin Supreme Court distort the language of *Barrett* that interpretation of a defendant's request for counsel is only required where the defendant's words understood as ordinary people would understand them, are ambiguous. *Barrett*, *supra*, at 529. In *Barrett* the accused explicitly limited his invocation of counsel (he did not want to put anything in writing until his attorney came). *Barrett*, *supra*, at 526. At best, McNeil's near silence at the initial appearance is ambiguous and requires the standard applied by the Court in *Barrett*! "We do not denigrate the 'settled approach to questions of waiver [that] requires us to give a broad, rather than a narrow interpretation to a defendant's request for counsel,'" *Barrett*, *supra*, at 529 citing *Jackson*, *supra*, at 625, 633.

In *Jackson* this Court addressed similar arguments from the petitioner, the State of Michigan. The Court rejected Michigan's reliance "on the factual differences between a request for counsel during custodial interrogation and a request for counsel at an arraignment." *Jackson*, *supra*, at 640. Michigan was asking the Court to find that absent a specific statement by an accused that he needs counsel for custodial interrogation separate from his request for counsel at an arraignment, the court could

not find an invocation of counsel for purposes of protection against self-incrimination during in-custody interrogation. The Court was not persuaded:

> "The State maintains that respondents may not have actually intended their request for counsel to encompass representation during any further questioning by the police. This argument, however, must be considered against the backdrop of our standard for assessing waivers of constitutional rights. Almost a half century ago, in *Johnson v. Zerbst*, 304 U.S. 458, 146 A.L.R. 357 (1938) a case involving an alleged waiver of a defendant's Sixth Amendment right to counsel, the court explained that we should 'indulge every reasonable presumption against waiver of fundamental constitutional rights.' *Id.* at 464, 146 A.L.R. 357. For that reason, it is the State that has the burden of establishing a valid waiver. *Brewer v. Williams*, 430 U.S. at 404. Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel—we presume that the defendant requests the lawyers services at every critical stage of the prosecution.[6] We thus reject the state's suggestion that respondents' requests for the appointment of counsel should be construed to apply only to representation in formal legal proceedings.[7]" *Jackson*, *supra*, at 633 (footnotes omitted).

Footnote seven in the above quotation was an endorsement of the Michigan Supreme Court's reasoning concerning the nature of an accused's request for counsel. Though the Michigan court ruled that Jackson had not invoked his Fifth Amendment right to counsel at his arraignment, this Court endorsed the Michigan Court's analysis of an accused's request for counsel including stages of the proceedings where interrogation is not taking place:

> "Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth

and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation to a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries single handedly." *Jackson, supra,* at 633-634 n.7.

The Court's reasoning in *Jackson* applies to McNeil. McNeil made no statements on the record at his initial appearance that he was limiting his invocation of counsel to the Sixth Amendment. McNeil had previously been advised by deputy sheriffs of his rights and chose to remain silent. He had been further advised by deputy sheriffs to cooperate by telling his side of the story concerning the armed and masked robberies and the homicide, but remained silent. However, his presence with counsel at his initial appearance was a clear indication that he felt that he did "not believe that he [was] sufficiently capable of dealing with his adversaries single handedly."[5]

[5] *Jackson, supra,* at 634 n.7, indicates again this Court's perception of the crucial function of counsel at interrogation. "The rule in Miranda . . . was based on this court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of the special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the court found that 'the right to have counsel present at the interrogation is indispensible to the protection of the Fifth Amendment privilege under the system' established by the court . . . the per se aspect of Miranda was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country. Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts." *Fare v. Michael C.,* 442 U.S. 702, 719 (1979) (Cites omitted); also, *Minnick v. Mississippi,* (89-6332) p. 7 (December 3, 1990), "When counsel is requested, interrogation must cease and officials may not reinstate interrogation without counsel present . . ."

The Wisconsin Court's analysis would not allow a police initiated interrogation of McNeil concerning the armed and masked robbery charges after his initial appearance. However, the Wisconsin Court refused to prevent such interrogations of McNeil on unrelated charges while he was in continuous custody after his initial appearance with counsel. The Wisconsin holding rests on the conclusion that McNeil did not want assistance from his counsel involving crimes for which he had not yet been charged. This conclusion flows from a faulty analy-

In *Patterson v. Illinois,* 487 U.S. 285 (1988), the Court addressed Sixth Amendment waivers using Fifth Amendment criteria. As part of its analysis, the Court viewed the waiver question as one of analyzing what the purpose of a lawyer could serve at a particular stage of the proceedings in the Sixth Amendment context. Analyzing the function of counsel was a method of describing whether the accused's waiver of counsel was an intentional "relinquishment or abandonment of a known right or privilege." *Patterson, supra,* at 292 citing *Johnson v. Zerbst, supra,* at 464, 58 S.Ct. at 1023. In the Fifth Amendment context, this Court has held that "we described this requirement as a 'full awareness [of] both the nature and of the right being abandoned and the consequences of the decision to abandon it.'" *Patterson, supra,* at 292, *Moran v. Burbine,* 475 U.S. 412, 421 (1986). This same functional analysis can be applied to the instance of McNeil appearing with counsel at his initial appearance. If McNeil had requested counsel in Nebraska the officers would no longer have the privilege to initiate interrogation of McNeil. McNeil's request for counsel before a magistrate does not lessen the critical function of counsel as outlined by this Court at an interrogation that takes place after the initial appearance while McNeil remains in custody.

sis that the language in *Jackson*, *supra*, at 633-634 n.7, applies only to the Sixth Amendment.[6]

The Wisconsin Court found that McNeil was invoking only his Sixth Amendment right to counsel and therefore he could not have been invoking his right to have counsel present when he was interrogated by police on unrelated charges. By refusing to acknowledge the reasoning in *Jackson* that lawyers and judges may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel but that average persons do not, the Wisconsin Court was able to ignore the rule of *Roberson* ["We do not read *Butler* and *Roberson* as affecting a transmutation of the Sixth Amendment right to counsel into a Fifth Amendment right to counsel," *McNeil*, *supra*, at 36 (J.A. 30)]. The *Roberson* decision, however, took into account the subjective state of an accused. In *Roberson* this Court stated:

> "Roberson's unwillingness to answer any questions without the advise of counsel, without limiting his request for counsel, indicated that he did not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney. This discomfort is precisely the state of mind that *Edwards* presumes to persist unless the suspect himself initiates further conversation about the investigation; unless he otherwise states, see

[6] Contra: "Many persons in custody today will invoke the Miranda right to counsel during the first interrogation, so that the permanent prohibition will attach at once. Those who do not do so will almost certainly request or obtain counsel at arraignment. We have held that a general request for counsel, after the Sixth Amendment right has attached, also triggers the *Edwards* prohibition of police-solicited confessions, see *Michigan v. Jackson*, 475 U.S. 625 (1986), and I presume that the perpetuality of prohibition announced in today's opinion applies in that context as well . . . This perpetual irrebuttable presumption will apply, I might add, not merely to interrogations involving the original crime but to those involving other subjects as well. See *Arizona v. Roberson*, 486 U.S. 675 (1988)." *Minnick v. Mississippi*, *supra*, at p. 8 (Scalia, J., dissenting).

> *Connecticut v. Barrett*, there is no reason to assume that a suspect's state of mind is in any way investigation-specific, see *Colorado v. Spring*, [479 U.S. 564; 107 S.Ct. 851; 93 L.Ed.2d 954 (1987)]." *Roberson*, *supra*, at 684.

The reasoning in *Roberson* and *Jackson* supports McNeil's claim that when he appeared with counsel at an initial appearance he was no more investigation-specific than *Roberson*. Testimony of Detective Smukowski indicates that when Smukowski was in Nebraska both he and McNeil knew that the murder case was being discussed when Smukowski encouraged McNeil to tell his side of the story (R 44-6, 7, 8). Having been initially advised of Miranda, McNeil refused to talk. After his refusal to talk, he was advised by police that it was in his interest to discuss all matters including the homicide, but McNeil refused to do so. This sequence of events together with McNeil's continual in-custody status, combined with his acceptance and appearance with counsel at an initial appearance resulted in McNeil being subjected to exactly the type of "subtle compulsion" that the Supreme Court of Wisconsin denied could exist when McNeil was interrogated the evening of May 22, 1987. *McNeil*, *supra*, at 37 (J.A. 31). By asserting his right to counsel and appearing with counsel at an initial appearance, McNeil indicated that he did not believe that he was sufficiently capable of dealing with his adversaries single handedly. As Justice Heffernan wrote in dissent:

> "It is apparent that there is danger of 'subtle compulsion', when a defendant requests the assistance of an attorney at an initial appearance and is nevertheless subjected to further interrogation while custody continues. Whether a request for an attorney is made to a police officer or to a judge, whether in the jail or during an initial appearance, the dangers of the inherent pressure of custodial interrogation when not having an attorney present are the same. Just as the *Edwards* protection is not dependent upon the subject

matter of the interrogation, neither is this protection dependent upon whether the request for assistance of counsel is made to a police officer while in custody or to a magistrate at an initial appearance before the defendant is interrogated." *McNeil*, *supra*, at 50 (J.A. 43).

B. This Court's Decision in *Arizona v. Roberson* Mandates Reversal

The decision of the Wisconsin Supreme Court which affirmed McNeil's conviction is contrary to a series of decisions by this Court which are "based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations." *Michigan v. Harvey*, *supra*, at 1180. The Wisconsin Court was unpersuaded that *Edwards v. Arizona*, *supra*, *Arizona v. Roberson*, *supra*, and *Butler v. McKellar*, 110 S. Ct. 1212 (1990), helped resolve the issue before this Court.

In *Edwards*, *supra*, at 477, 484, 485, this Court reasoned that Miranda "indicated that assertion of the right to counsel was a significant event" and that the assertion calls for additional safeguards. ". . . when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights." *Edwards*, *supra*, at 484. The Court further held that an accused ". . . having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communication, exchanges, or conversations with police." *Edwards*, *supra*, at 484-485. The court emphasized: "It is inconsistent with Miranda and its progeny for the authorities at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Edwards* at 485. "In the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith v. Illinois*, 469 U.S. 91, 98 (1984), citing *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983); *Fare v. Michael C.*, 442 U.S. 707, 719 (1979).

The concept enunciated in *Edwards* was applied by this court to sequential police interrogations involving separate offenses. *Arizona v. Roberson*, *supra*.[7] In *Roberson*, the defendant was arrested for burglary and given Miranda warnings. Subsequently, defendant was arrested for burglary and given Miranda warnings. Subsequently, defendant stated he wanted a lawyer before answering any questions. Three days later, while the defendant was still in custody, a second police officer interrogated the suspect about a previous burglary for which the defendant had not been in custody. The second officer was not aware that the defendant had earlier requested counsel. The second officer advised the defendant of his Miranda rights and obtained an incriminating statement concerning the previous burglary.

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[7] Explaining the purpose of *Edwards*, this Court stated:

"[T]he prophylactic protections that the *Miranda* warnings provide to counter act the 'inherently compelling pressures' of custodial interrogation and to 'permit a full opportunity to exercise the privilege against self-incrimination,' 384 U.S. at 467, 86 S.Ct. at 1624, are implemented by the application of the *Edwards* corollary that if a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspects own instigation, is itself the product of the "inherently compelling pressures" and not the purely voluntary choice of the suspect. As Justice White has explained, 'the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the

Roberson held that the trial court properly suppressed the statement. This Court was not satisfied that because Roberson was being questioned about an unrelated offense that his statement should be admitted into evidence. *Roberson, supra.*[8] "As a matter of law, the presumption raised by a suspect's request for counsel—that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance—does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." *Roberson, supra,* at 683.

The Court in *Roberson* granted certiorari to "resolve a conflict with certain other state court decisions," on the separate investigation issue. *Roberson, supra,* at 679 n.3. One of the cases cited in n.3 was *U.S. ex rel Espinoza v. Fairman, supra.* The Court stated that the Seventh Circuit had the same rule as the Arizona Supreme Court decision which was affirmed by this Court in *Roberson.*[9]

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authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.'" (*Michigan v. Mosley,* 423 U.S. 96, 110, n.2), *Roberson, supra,* at 681.

[8] In *Roberson* the Court rejected petitioner's urging based on *Maine v. Moulton,* 474 U.S. 159 (investigation of uncharged offenses did not violate the defendant's Sixth Amendment right to assistance of counsel) that in the "Fifth Amendment context 'statements about different offenses developed at different times, by different investigators, in the course of two wholly independent investigations, should not be treated the same.'" Brief for Petitioner 32. This argument overlooks the differences between the Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination. The former arises from the fact that the suspect has been formally charged with a particular crime and thus is facing a State apparatus that has been geared up to prosecute him. The latter is protected by the prophylaxis of having an attorney present to counter-act the inherent pressures of custodial interrogation, which arise from the fact of such interrogation and exist regardless of the number of crimes under investigation or whether those crimes have resulted in formal charges." *Roberson, supra,* at 685.

[9] The *Espinoza* case is very similar factually to the facts in McNeil. In *Espinoza* the police had arrested a suspect on a weapons

The *Roberson* decision had an impact on Federal Circuit cases similar to the fact situations developed in *Espinoza* and *McNeil.* In *United States v. Wolff,* 879 F.2d 1320 (6th Cir. 1989), the defendant Wolff had been arrested for theft and possession of forged instruments. Wolff was appointed counsel at arraignment. Subsequently, while in custody, Wolff was interrogated by gov-

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charge, and after investigating the weapon that Espinoza had in his possession, came to a conclusion that he had committed a murder. Espinoza was subsequently arraigned on that weapons charge where he was represented by counsel. After the arraignment, Espinoza remained in continuous police custody. Subsequently the police initiated an interrogation concerning the murder. During that interrogation, Espinoza was not represented by counsel, waived his Miranada rights, and confessed to the murder. At his trial, Espinoza moved to have the murder confession suppressed. The trial court denied his motion and he was convicted of murder.

Espinoza exhausted state remedies and then petitioned for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. The petition was granted finding that Espinoza had a Fifth Amendment and Sixth Amendment right to have counsel at the interrogation concerning the homicide, and that he had not knowingly and voluntarily waived those rights. The Seventh Circuit Court of Appeals found that the statements of Espinoza should have been suppressed pursuant only to the Fifth Amendment.

In the instant case, McNeil was returned from Omaha to Wisconsin for an armed and masked robbery. Investigating officers had already focused upon McNeil as a prime suspect in a murder case based on information from three witnesses. When McNeil was brought in custody to Milwaukee, the police already had information from these persons implicating McNeil (R 47-7 thru 11). Apparently not satisfied that they would be able to obtain a conviction based on the testimony of these witnesses, the officers spent the next week interrogating McNeil, disregarding his invocation of rights which had taken place at his initial appearance, more particularly his invocation of his right to counsel under the Fifth Amendment. The subsequent police initiated interrogations of McNeil were not a happenstance resulting from casual conversation between an inmate and an officer. The interrogations were an organized, planned, and well implemented systematic approach to breaking down an individual's ability to withstand structured coercion. It worked.

ernment agents and she confessed to involvement in a murder conspiracy. The Sixth Circuit initially ruled the confession admissible in an unpublished order affirming Wolff's conviction.

Wolff filed a Petition for Writ of Certiorari which this Court granted vacating the Sixth Circuit unpublished order and remanding the matter to the Sixth Circuit for further consideration in light of this Court's decision in *Roberson*. *Wolff v. United States*, *cert. granted* 488 U.S. 807 (1988). After the Sixth Circuit received the October 3, 1988, order from this Court, it reversed its earlier decision and approved the *Espinoza* holding that the invocation of "right to counsel at arraignment triggers *Edwards*" and the "prophylactic rule of *Roberson*." *Wolff*, *supra*, at 1323.

Just as Wolff was appointed an attorney at her arraignment, McNeil was appointed an attorney at his initial appearance. Just as Wolff was returned to the jail where she had spent the previous night and later that day was interviewed while still in custody, McNeil after his initial appearance was returned to the jail where he had spent the previous night and was visited a few hours later by Detective Butts and interrogated. Like Wolff, McNeil was advised of his Miranda rights and signed a form stating that he understood and wished to waive those rights. The Sixth Circuit felt compelled to find pursuant to this Court's remand and its own understanding of *Roberson*, that on the facts of the case before them *Roberson* was violated. *Wolff*, *supra*, at 1322 (Absence of evidence indicating that *Wolff* intended to limit her invocation of counsel to the Sixth Amendment, therefore any doubts resolved to protect her constitutional claim, citing *Jackson*, *supra*, at 633).

The *Roberson* decision also had an immediate impact in the Fourth Circuit. In *Butler v. Aiken*, 846 F.2d 255 (4th Cir. 1988), Butler like McNeil had been arrested on an unrelated charge and placed in the Charleston County

Jail. Butler retained local counsel who appeared with him at a bond hearing on the assault and battery charge. Unable to make bond, he was returned to custody in the county jail. He was subsequently questioned and confessed to an unrelated homicide. In the first *Butler* hearing which involved the issue which is presently before this Court, but was held prior to the *Roberson* decision, the Fourth Circuit disapproved and rejected the *Espinoza* decision. *Butler v. Aiken*, *supra*, at 255, 258. Subsequently, on motion for reconsideration, the Fourth Circuit took note that the *Roberson* decision had been decided on the same date as its earlier decision which rejected *Espinoza*. In its second *Butler* decision, *Butler v. Aiken*, 864 F.2d at 24 (4th Cir. 1988) the Court of Appeals responded to the State of South Carolina's attempt to distinguish *Roberson*. The court stated:

> "As an initial matter, we reject respondent's effort to distinguish *Roberson* factually. *We assume for purposes of decision that the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's fifth amendment rights.* The subsequent interrogation concerning the Lane murder occuring during continuous custody, was contrary to the *Edwards* rule as modified in *Roberson*. If this case were before us on direct appeal, we would in all likelihood, be compelled to reverse the conviction and remand for a new trial." *Butler v. Aiken*, 864 F.2d at 25 (emphasis added).[10]

The Wisconsin Supreme Court held that *Butler* and *Roberson* do not affect "a transmutation of the Sixth Amendment right to counsel into a Fifth Amendment

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[10] In *Butler v. McKellar*, 110 S.Ct. 1212 (1990), this Court implied that absent the retroactivity issued, if Butler had been questioned post *Roberson*, the outcome may have been different. "The interrogation of Butler, while unquestionably contrary to present 'guidelines' was conducted in strict accordance with established law at the time." *Butler*, *supra*, at 1216.

right to counsel." *McNeil, supra,* at 36 (J.A. 30). The Wisconsin Court's statement ignores the stated purpose for this Court granting certiorari in *Roberson* and the implications of the *Wolff* and *Butler* decisions.

1. *The Wisconsin Supreme Court Ruling Is Contrary to This Court's Findings of When an Accused Has Invoked His Right to Counsel Pursuant to the* Miranda, Edwards, Roberson *Line of Cases*

The Wisconsin Supreme Court has made much of the view that McNeil was not being interrogated when he made his appearance with counsel at the initial appearance and therefore was not invoking his right to counsel pursuant to the Fifth Amendment. The Court in *Miranda* held that if a suspect "indicates in any manner at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda, supra,* at 444-45. The process of invoking Fifth Amendment rights by asserting the need for or appearing with counsel at an initial appearance or retaining counsel prior to interrogation has been recognized implicitly by this Court in cases involving the application of the *Edwards-Roberson* rule.[11]

Wyrick v. Fields, 459 U.S. 42 (1982), involved a soldier charged with raping an 81 year old woman. Fields was charged with the crime and after his arrest was released on his own recognizance. He retained private defense counsel. After discussing the matter with his counsel and a military attorney provided him by the Army, Fields requested a polygraph examination. He was subsequently examined after signing Miranda waivers. Subsequent to the examination, Fields admitted to having intercourse with the victim, and the statements that he made were utilized at trial. The Court of Appeals Eighth Circuit found that the police conduct in question contravened the clear import of this Court's decision in *Edwards*: "A defendant's right to have counsel present at custodial interrogations must be jealously guarded." *Fields, supra,* at 45.

This Court reversed the Court of Appeals. "In *Edwards,* this Court has held that once a suspect invokes his right to counsel, he may not be subjected to further interrogation until counsel is provided and unless the suspect himself initiates dialog with the authorities." *Fields, supra,* at 45. This Court agreed with the lower court that Fields initiated the interrogation. *Fields, supra,* at 218. Implicit in this finding was that Fields had invoked his right to counsel by retaining counsel. If Fields had not invoked his right to counsel, a Fifth Amendment waiver analysis "including the fact that the suspect initiated the questioning" would not have been necessary. *Fields, supra,* at 48.[12]

The Wisconsin Supreme Court erroneously cited *Butler v. McKellar, supra,* for the proposition that invocation of the Fifth Amendment right to counsel cannot take place at an arraignment or initial hearing. The Wisconsin majority found that "the facts in *McKellar* indicate that 'unlike McNeil, Butler invoked his Fifth Amendment right to counsel upon arrest on an unrelated assault and battery charge' and then retained counsel." *McNeil, supra,* at 35 (J.A. 29). The Wisconsin Court is wrong. The critical facts in *Butler* are similar to the facts in *McNeil.* ante p. 2-5. (Both Butler and McNeil

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[11] Petitioner has not found cases where this Court has explicitly ruled on the issue of invocation of counsel at arraignment or initial appearance for Fifth Amendment purposes. The cases cited are those where this Court has made an implied finding that retaining or appearing with counsel at an initial appearance or arraignment invokes Fifth Amendment rights pursuant to Miranda.

[12] In *Fields* this Court did not address Sixth Amendment right to counsel issues. The Sixth Amendment issues were not before the Court. *Fields, supra,* at 49. There was no indication that when Fields retained counsel he was being interrogated or was about to be interrogated.

were arrested for crime A; appeared with counsel to set bond; remained in custody, and were questioned without counsel being present about crime B.) There are some differences: 1) When Butler was arrested, he was given his Miranda rights which he waived and made a statement concerning the arrest for assault and battery with intent to kill (see *Butler v. McKellar*, *supra*, 86-6677, Joint Appendix p. 5) whereas McNeil refused to make a statement when given an opportunity in Omaha by Milwaukee County Deputy Sheriffs: 2) When Butler appeared at his bond hearing on assault and battery charges, he appeared with retained counsel whereas when McNeil appeared at his bond hearing he appeared with appointed counsel. Both men were interrogated more than once while in continuous custody by police officers who initiated visits to McNeil and Butler.

This Court wrote that Butler after invoking his Fifth Amendment right to counsel retained counsel who appeared with him at a bond hearing on August 31, 1980. *Butler*, *supra*, at 1214. Subsequently, Butler was returned to the County Jail where he was interrogated on an unrelated matter which resulted in a homicide and kidnapping charge. The Court did state though that the interrogation of Butler would be unquestionably contrary to "present guidelines", *Butler*, *supra*, at 1216, which is consistent with this Court's remand in the *Wolff* case, ante, p. 24.

The language of this Court stating that Butler appeared with retained counsel after invoking his Fifth Amendment right to counsel can be read to imply that Butler informed police officers prior to counsel's appearance at the bond hearing that Butler did not wish to proceed with interrogation without counsel present. The Joint Appendix in the *Butler* case reveals no evidence to warrant that conclusion. (See *Butler v. McKellar*, *supra*, J.A. p. 5 wherein the recorded testimony shows that the investigating officer testified that he took a statement

from Butler prior to the bond hearing after advising Butler of his Miranda rights. There is no testimony that Butler invoked his right to counsel at that time or at any other time prior to his appearance with counsel at the bond hearing). Presuming that this Court relied on the record as it appears in the *Butler* Joint Appendix, the inference is that Butler's appearance with retained counsel at a bond hearing was his only invocation of his Fifth Amendment right to counsel. Such an inference is consistent with the Fourth Circuit assumption that Butler's appearance with counsel was a conclusive demonstration of Butler's invocation of Fifth Amendment rights. *Butler v. Aiken*, ante, p. 25.

The implied finding that the right to Fifth Amendment counsel was invoked by Butler when he appeared with counsel at a bond hearing is consistent with one of the purposes of *Miranda-Edwards*: ". . . once an individual in custody invokes his right to counsel, interrogation must cease until an attorney is present' . . ." *Minnick*, *supra*, at p. 3. The Wisconsin majority rule that absence of interrogation at the initial hearing removes a requirement empowering an accused to invoke his Fifth Amendment right to counsel disregards the significance of the assertion and the need for "additional safeguards." *Jackson*, *supra*, at 636. "Nowhere does *Edwards* or any of its progeny indicate accuseds must assert their *Miranda* right to counsel while they are being interrogated. The request must be made while the defendant is in custody, prior to, or during, an interrogation.' *McNeil*, *supra*, at 50 (Heffernan, C.J., dissenting) (J.A. 42, 43).[13]

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[13] *Smith v. Illinois*, 469 U.S. 91 (1984), gives some guidance as to the principle from Miranda underlying the significance of timing when the assertion for counsel is made. When detectives informed the defendant that he had a right to his counsel's presence at the interrogation, the accused responded "Uh, yeah. I'd like to do that." *Smith*, *supra*, at 93. Ignoring this request, the detective in question continued advising Smith of his Miranda rights. Smith eventually made incriminating statements which were utilized by

2. *The Bright Line Character of* Edwards-Roberson *Has Provided Clear and Enforceable Guidance for Law Enforcement Officials and Should Apply to an Accused Who Asserts His Right to Counsel or Appears With Counsel at an Initial Appearance or Similar Hearing*

This Court has approved the utilization of bright line rules to protect Fifth Amendment rights:

> "We have repeatedly emphasized the virtues of a bright line rule in cases following *Edwards* as well as *Miranda*. See *Michigan v. Jackson*, *supra*; *Smith v. Illinois*, *supra* . . . we explained that the 'relatively rigid requirement that interrogation must cease upon the accused's request for an attorney. . . has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation and of informing court's under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity which benefits the accused and the state alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence, even though the confession might be voluntary under traditional Fifth Amendment analysis.'" *Roberson*, *supra*, at 681 (Cites omitted) (Footnote omitted).

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the State. This Court, in reversing the Illinois Supreme Court, reaffirmed that when an accused indicates "in any manner at any stage of the process that he wishes to consult with an attorney before speaking, the accused is not subject to further interrogation by the authorities." *Smith*, *supra*, at 95. The majority took note of the assertion that common sense suggests that the "police should both complete reading petitioner's rights and then ask him to state clearly what he elects to do, even if he indicated a tentative desire while he was being informed of his rights." *Smith*, *supra*, at 104 (Rehnquist, J., dissenting). The majority found such reasoning as "plainly wrong." A request for counsel coming "at any stage of the process" requires that questioning cease until counsel has been provided. *Smith*, *supra*, at 98.

In *Roberson*, the court approved again the bright line character of the *Edwards* rule that ". . . serves the purpose of providing 'clear and unequivocal' guidelines to the law enforcement profession. Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire to deal with the police only through counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (Cites omitted) *Roberson*, *supra*, at 682.

In deciding *Roberson* the Court denied the petitioner's contention that the "bright line, prophylactic *Edwards* rule should not apply when the police initiated interrogation following a suspect's request for counsel occurs in the context of a separate investigation." *Roberson*, *supra*, at 682. One of the bases for the bright line rules is the "supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations." *Harvey*, *supra*, at 1180.[14] "In the absence of such a bright line prohibition [the *Edwards* rule] the authorities through "badger[ing] or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself not withstanding his earlier request for counsel's assistance." *Smith*, *supra*, at 98.

The Wisconsin majority has devised their own bright line rule disregarding this Court's admonition that average persons when invoking their right to counsel do not "understand and appreciate the subtle distinction between

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[14] In *Harvey*, *supra*, this Court explaining the *Jackson* bright line waiver rule wrote:

> ". . . the protective rule we created in *Jackson* [is] based on the apparent inconsistency between a request for counsel and a later voluntary decision to proceed without assistance." *Harvey*, *supra*, at 1181 (cites omitted).

Fifth and Sixth Amendment rights to counsel." *Jackson*, *supra*, at 633-634 n.7. Disregarding *Zerbst*, *supra*, and *Moran v. Burbine*, 475 U.S. 412 (1986) ("A full awareness [of] both the nature of the right being abandoned and the consequences of the decision to abandon it") *Moran*, *supra*, at 421, the Wisconsin rule does not allow for a hearing to determine the totality of facts and circumstances of the case when the accused invokes his right to counsel at the initial appearance. ("We hold that a defendant does not invoke his or her Fifth Amendment right to counsel by invoking the Sixth Amendment right to counsel at an initial appearance.") *McNeil*, *supra*, at 36 (J.A. 30). The Wisconsin majority disregards the reality faced by an accused. Surely, an accused who feels the necessity to shield himself from the police and seek the protection of counsel as a "medium between himself and the State", *Maine v. Moulton*, 474 U.S. 159, 176 (1985) concerning an armed and masked robbery seeks the same shield of counsel concerning a homicide investigation.

The absence of the bright line rule advocated by McNeil concerning the issue before the Court will result in additional hearings which will burden courts with lengthy examinations of defendants who will insist they intended to invoke their Fifth Amendment right to counsel at an initial appearance. Numerous post conviction hearings with counsel defending themselves from an onslaught of ineffective claims will result. Courts will have to determine if counsel advised clients to invoke their Fifth Amendment right to counsel at the initial appearance or informed magistrates that clients were invoking Fifth Amendment right to counsel.

The bright line rule being urged on the Court by McNeil is concise. A defendant who at an initial appearance or similar proceeding requests counsel or appears with counsel may not be questioned by police while he remains in continuous custody unless the defendant himself initiates interrogation. This affords the defendant the same rights that exist for an accused who, prior to his appearance at an initial appearance or similar hearing invokes his right to counsel. It also ". . . has the virtue of providing police and prosecutors with specificity as to what they may do in conducting custodial interrogations, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Roberson*, *supra*, at 681. Such a rule would further the *Edwards* policy of ". . . conserv[ing] judicial resources which would otherwise be expended making difficult determinations of voluntariness, and implement[ing] the protection of Miranda in practical and straightforward terms." *Minnick*, *supra*, p. 4. Such a rule would have the merit of ". . . clarity of . . . command and . . . certainly of its application." *Minnick*, *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Supreme Court affirming McNeil's conviction should be reversed.

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STATUTORY APPENDIX

STATUTORY APPENDIX

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.